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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/509,137	09/27/2004	Jeffrey S Lockwood	7175-71858	1944

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BARNES & THORNBURG LLP  
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INDIANAPOLIS, IN 46204

EXAMINER
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REICHLE, KARIN M

ART UNIT	PAPER NUMBER
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3761

NOTIFICATION DATE	DELIVERY MODE
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06/03/2009

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

indocket@btlaw.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/509,137	<b>Applicant(s)</b> LOCKWOOD ET AL.	
	<b>Examiner</b> Karin M. Reichle	<b>Art Unit</b> 3761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 24 March 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 3-24-09 has been entered.

### ***Specification***

2. The use of the trademark TEGADERM and OPSITE FLEXIGRID, page 10, lines 2-3, has been noted in this application. It should be capitalized wherever it appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

Trademarks should be in all capital letters or with the trademark symbol, not both. Note MPEP 608.01(v), I., paragraph 6-20 therein, Examiner Note 1 thereof.

***Claim Rejections - 35 USC § 112***

3. Claims 1-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 1, at the very least, the description of the at least one discrete opening as being “uncovered at the top surface” on line 9 but “configured to be directly open to an undermined portion of the wound such that negative pressure is communicated to the undermined portion of the wound directly from the at least one discrete opening” on lines 9-11 is unclear/inconsistent, e.g. the undermined portion of the wound covers the opening at the top surface. This also applies to similar language on lines 10 and 16-18. It is noted that contrary to Applicant’s remarks the claim language does not require “uncovered at the top surface” to being uncovered or unobstructed by any other structure or component of the claimed member. The deletion of the language “uncovered” in claim 1 and in claim 9 and the insertion of --each-- before “adapted” on the second to last line of claim 9 is suggested. With regard to claim 8, at the very least, lines 9-13 are unclear/inconsistent since it is unclear what range is covered by terminology “approximately the entire” planar bottom surface ( Note MPEP 2173.05(b) with respect to similar language “at least about” and the portion of the top surface engaged thereby is only that between/without channels “along such surface” and such portion of the top surface relative to the entire surface, i.e. including the channels, has also not been set forth).

***Claim Language Interpretation***

4. Since no claim language has been explicitly defined, such terminology will be given its broadest reasonable interpretation in light of the specification, e.g. its dictionary definition. Therefore, the terminology “channel” is defined by the dictionary not only as “a trench furrow or groove” but also as “a tubular passage for liquids” as well as “a course or passage through which something may be moved or directed”. Due to the lack of clarity discussed in the preceding paragraph, claims 1 and 9 are interpreted to require the discrete opening/holes at the top surface be “uncovered” sometime, e.g. prior to use, but configured to be directly open to an undermined portion of the wound such that negative pressure is communicated to the undermined portion of the wound directly therefrom also at sometime. Due to the lack of clarity discussed supra, claim 8 will be interpreted to require a generally continuous bottom surface with no projections extending directly therefrom which extends between an outer perimeter of the cover and some portion thereof is directly engaged with the top surface of the wound layer.

***Claim Rejections - 35 USC § 102***

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 1-11 are rejected under 35 U.S.C. 102(e) as being anticipated by Risk Jr. et al ‘807, and thereby, by incorporation, Lockwood et al ‘681.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C.

Art Unit: 3761

102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention “by another,” or by an appropriate showing under 37 CFR 1.131.

Claim 1: See the Claim Language Interpretation section, hereinafter also referred to as CLI, as well as ‘807 at, e.g., Figure 9 and col. 9, line 66-col. 10, line 59, and thereby, by incorporation, ‘681, i.e. the member is 604 and 618, the wound contactable layer is 604 having a bottom surface which is adapted to be in contact with and generally conform to the wound surface, the “discrete” holes are 614 extending through the bottom surface thereof, the cover is 618 which includes at least one “discrete” opening, see 618 in Figure 9 between lines thereof and, e.g. col. 10, lines 35-43, extending through the top surface thereof, see Figure 9, and the port is 620 which is configured to communicate with the vacuum source and in fluid communication with each “discrete” hole and the at least one “discrete” opening (It is noted that “communicate” includes direct and/or indirect communication). As discussed supra claim 1 now also requires the at least one discrete opening extending through a top surface of the cover be “uncovered”, see CLI supra, and configured to be directly open to an undermined portion of the wound at the top surface such that negative pressure is communicated to an undermined portion of the wound directly from the at least one discrete opening, i.e. the structure of the opening has the capability, property or function of opening directly to an undermined portion of the wound at the top surface such that negative pressure is communicated to an undermined portion of the wound directly from the at least one discrete opening. See again Figure 9 as well as col. 10, lines 35-43 and discussion supra. Therefore, since ‘807 teaches the claimed structure as well as such

Art Unit: 3761

being capable of communicating a negative pressure therethrough, i.e. communicates directly therefrom to the area therearound, and placement in a wounds, i.e. the capability of contacting and conforming to wound surfaces (note also '681 and sentence bridging cols. 6-7), at the very least, there is sufficient factual evidence for one to conclude that such same structure also inherently includes the same capability, property or function as claimed, i.e. the structure of the opening has the capability, property or function of opening directly to an undermined portion of the wound at the top surface such that negative pressure is communicated to an undermined portion of the wound directly from the at least one discrete opening at sometime, see MPEP 2112.01.

Claim 2: See the Claim Language Interpretation section supra, i.e. the definition of “channels”, and the portions of '807 cited supra, i.e. the “channels” of the upper surface are 606, see also Figures of '681 incorporated by '807, and the cover 618 has a bottom surface which engages with the top surface of the wound contactable layer and cooperates with such channels to define a plurality of passageways between the port and each discrete hole and between the port and the at least one discrete opening as claimed, see Figure 9 and col. 10, lines 35-43. It is noted that the claim does not require each of the passageways being a discrete passageway between the port and each hole or between the port and each opening.

Claim 3: See the Claim Language Interpretation section supra and Figure 9 of '807 and Figure 7 of '681, i.e. a surface area of the cover, e.g. the engaged surface of the packing, e.g., the center of 618/bottom surface 58, is smaller than a surface area, e.g. the top surface of 604/20, i.e. of the wound contacting layer, so that layer 604/20 and thereby, the “channels”, e.g. 606/28/30, extend beyond an outer edge of cover 618/58 and define a plurality of the “discrete” openings,

Art Unit: 3761

i.e. such “channels” at the top surface thereof laterally beyond the engaged surface of the packing.

Claim 4: See the Claim Language Interpretation section *supra*, the discussion of claim 1 *supra* and Figure 9 again, i.e. ‘807 teaches the cover includes more than one of the discrete openings through the top surface thereof, i.e. the pores of packing 618, in communication with channels 606/28/30.

Claim 5: See the discussion of claims 1, 2 and 4 *supra*.

Claim 6: See the Claim Language Interpretation section *supra* and the discussion of the claims *supra*, i.e. ‘807 teaches the claimed structure and a cover including a outer peripheral portion (It is noted that no specific dimension of such portion is claimed nor the specific relationship of such with regard to the remaining portions of the cover is claimed) and such cover including at least two openings which are closer to the periphery or edge than other openings or the center point, see Figure 9.

Claim 7: The terminology "relative thin and flexible" is considered relative absent the claiming of specific dimensions of thinness and flexibility. See also '807 at the portions cited with respect to claim 1 and thereby, also ‘681 at, e.g., col. 4, lines 50- col. 11, lines 54-57, e.g. layers described as "thin" and "flexible" and “of gauze”. Therefore the member is also considered to be "relatively thin" and "flexible”.

Claim 8: See the discussion of claims *supra* with regard to lines 1-8 and 11 *et seq* and the discussion *infra* of the new claim language with regard to lines 8-11. Claim 8 now claims the cover having a generally continuous planar bottom surface which extends between an outer perimeter of the cover wherein approximately the entire surface is directly engaged with the top



Art Unit: 3761

surface of the wound contactable layer, as best understood, see CLI supra. Therefore also see '807 at the cited portions, esp. Figure 9 and paragraph bridging cols. 9-10 and thereby, e.g., 681 at Figure 7, i.e. as best understood, the cover includes a generally continuous bottom surface with no projections extending directly therefrom which extends between an outer perimeter of the cover and some portion thereof is directly engaged with the top surface of the wound layer.

Claims 9 -11: See the discussion of claims supra, esp. 1, 6 and 7.

### ***Double Patenting***

7. The Terminal Disclaimer filed 3-34-09 has been received in the filed and deemed proper by the appropriate reviewing authority.

### ***Response to Arguments***

8. Applicant's remarks have been considered but are either deemed moot in that the issue has not been reraised or deemed not persuasive for the reasons set forth supra.

### ***Conclusion***

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (571) 272-4936. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3761

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Karin M. Reichle/  
Primary Examiner, Art Unit 3761

May 28, 2009